No. 11116

In the United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE M. McBRIDE, Trustee in Bankruptcy of Western Bond and Mortgage Company, an Oregon Corporation, Bankrupt,

Appellant,

v.

C. H. FARRINGTON,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL MEMORANDUM

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CASES AND AUTHORITIES

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The Appellee saw fit to file and serve, on the day of the argument of this case, a Supplemental Memorandum claiming that the Appellant had advanced for the first time certain arguments in his Reply Brief. This was obviously not correct because the points covered by the Appellee's Supplemental Memorandum were points which were raised by Ap-

pellee in his brief, and were therefore answered by Appellant in his Reply Brief. There was no new matter in our Reply Brief. It contained merely a refutation of arguments made by the Appellee in his Brief.

However, be that as it may, the first point stressed by Appellee in his Supplemental Memorandum is that Findings of Fact III made by the trial court, that,

> "Plaintiff had actual knowledge *or* was in possession of information which was sufficient to guide him to actual knowledge of the matters alleged in the complaint,"

was a proper finding of fact. Since Appellee in its Brief claimed this finding (as well as others) was not subject to review, we had insisted that such finding was reviewable because it was not a real finding of fact and was meaningless as a finding. That is was a mere argument, a conclusion, or at best an inference. A finding, we maintained, and still maintain, must be a finding *of fact* and certainly a court cannot properly make a finding in the form of "either/or." If the facts had justified a finding that actual discovery had been made, then a finding to that effect should have been made. If, on the other hand, the court found that there were facts presented in evidence which justified the conclusion that the trustee was in possession of information which was sufficient to guide him to knowledge, then the finding should have set forth

specifically what such facts were. We presented this view to the court in our Reply Brief, as a demonstration that the findings of the trial court were merely inferences or conclusions and not really findings, and we, therefore, asserted that this court was as capable of making such inferences and conclusions as was the trial court, since it had all the evidence before it and there was no dispute concerning the testimony nor any contradictions therein.

We insist that the three cases cited and quoted from by the Appellee in his Supplemental Memorandum (pp. 2 to 4) do not bear out what it is claimed for them by Appellee.

Clyde Equipment Co. v. Fiorita, 16 F. (2d) 106, has no bearing whatsoever on the propriety or impropriety of a disjunctive finding. It merely holds that a finding susceptible of one of two constructions will be given the construction which will support the judgment. Obviously that is good law, but it has no applicability here.

Perkes v. Utah Idaho Milk Co., (Utah) 39 P. (2d) 308, 311, merely holds that findings made in the alternative, both of which may be true, do not in themselves justify a *reversal* of the judgment. (See Syllabus 8). We have never claimed that Finding No. III was of such a nature as to justify a reversal. All that we maintained was that the finding was of such a nature as to impel the appellate court to treat it as a mere inference or conclusion, and not as a real finding of *fact.* Therefore, we insisted that the ap-

pellate court was as well qualified as the trial court to make its own inferences, since the evidence was not conflicting.

Rubenstein v. Washington Cold Storage Co., (Wash.) 138 P. (2d) 852 (incorrectly cited by Appellee as 148 P. (2d)), merely held that a finding that loss of whiskey in a warehouse was caused either by theft or leakage and through no negligence of the warehouseman supported a judgment in favor of the warehouseman. Obviously such a holding was proper since the question for determination was merely the negligence or care of the warehouseman.

The attempt by Appellee (pp. 3-4) to insinuate that the testimony of McBride, to the effect that he had no knowledge of the acts charged in the complaint until shortly before suit was instituted, should be given no weight, and the citation of *Foster v. Mansfield C. & L. M. Co.* 13 Sup. Ct. 28, 146 U.S. 88, 36 L. Ed. 899, as justifying such insinuation, is without warrant. We agree with the statement in that case that the defense of want of knowledge is easily made and easily testified to by one claiming such want, but we find nothing in that case to indicate that where such testimony is positively given and where there is no evidence to the contrary that a finding of knowledge may be supported without any evidence on which to base it, as against contrary positive testimony.

Appellee next maintains in his Supplemental Memorandum (pp. 5-9) that the court was justified in finding that the participants in the transaction who had died, knew the material facts and that therefore defendant was deprived of the means of his defense through inability to produce evidence. He claims that *mere death alone* or a *likelihood* that there would be an obscuration or loss of evidence by a lapse of time justifies the finding of laches by a trial court, even though there be no testimony showing such a loss or obscuration or a showing that those who had died had knowledge of material facts helpful to defendant. The Appellee cites an authority (30 C.J.S., Section 119, page 543) and several cases. However, a reading of this authority and of these cases do not justify any such conclusion. In fact, the very authority cited by the appellee states,

> "Death of a party will not alone render doctrine of laches applicable, and loss of evidence, although affording test of applicability of laches, must be material. *Shirley v. Van Every*, 167 S.E. 345, 159 Va. 762; 21 C.J., p. 236 note 1 (b); C.J.S., §119, p. 543, note 35."

Further the very next section in C.J.S. (Section 120, pp. 543-544) says,

> "Lapse of time will not bar relief where circumstances exist which excuse the delay and render it inequitable to interpose the bar. To charge a party with laches in delaying to assert a right, an opportunity to have acted sooner must have existed; if he acted at the first opportunity, and sued substantially as soon as the occasion arose

for an assertion of his right, laches are not imputable to him. . . . Greater liberality is allowed in excusing delay where actual fraud is charged than in other cases. The criterion of what constitutes an excuse is applied with less strictness where plaintiff is a *public officer* seeking to enforce public rights than where he sues as an individual." (*Emphasis ours*)

Moreover, the Oregon cases are to the contrary.

In *Willis v. Nehalem Coal Co.*, 52 Ore. 70, 89; 56 P. 528, it is said,

"It is asserted by defendants that the complaint shows that for fully four years prior to the institution of this suit plaintiff had full notice and knowledge of the grievances complained of, and from this it is argued that they are guilty of such laches that must defeat the suit. *Full knowledge of all the facts* concurring with a delay for an unreasonable length of time are the essential elements of the defense of laches. Until *knowledge* is shown to exist, the beginning of time from which laches will run cannot be said to commence: 2 Cook, Corporations (4th Ed.) 751 . . . . The rule, if such is the rule, that, when the means or knowledge are open to the stockholder, he is chargeable with knowledge, from the date when he should have ascertained the facts, cannot be applied here for two reasons: First, because the means of knowledge is rebutted by the averment, that the officers and directors have refused to permit the stockholders to examine the books of the corporation: and, second, *because constructive notice or knowledge does not apply to a case of fraud and cannot relieve a party responsible for fraud.*" (*Emphasis ours*)

In the case of *May v. Roberts*, 133 Ore. 643, 659; 286 P. 546, it is held,

> "Mere delay of itself is not laches, *but delay that has worked to the injury of another*. . . . . The defendants contend that valuable evidence in support of their case was lost by the death of Robert Gunning, ... that if he were alive he would testify to his own good faith in the proceedings. . . . The fraud and collusion of defendant and associates . . . . is conclusively established by their own evidence. The testimony of Robert Gunning would not be of any avail to them: Sedlak v. Sedlak, 14 Or. 540 (13 P. 452)." (*Emphasis ours*)

In *American Surety Co. v. Multnomah County*, 171 Ore. 287, 327; 138 P. (2d) 597, it is said,

> "We find nothing in the complaint other than the apparent lapse of time which is suggestive of laches. Lapse of time does not constitute laches *unless the delay works to the injury of another*. Wills v. Nehalem Coal Company, 52 Or. 70, 56 P. 528; May v. Roberts, 133 Or. 643, 286 Pac. 546. It has also been held that *full knowledge of all the facts* concurring with a delay for an unreasonable time are essential elements of the defense of laches, and we are not bound to presume that Marion County or the plaintiff surety company had knowledge of Drager's defalcations. Wills v. Nehalem Coal Company, supra." (*Emphasis ours*)

From these Oregon cases it will be observed that there is a definite requirement that the evidence must show that the delay has worked to the injury of the party claiming laches and therefore, it must show that the facts, which death caused an inability to pro-

duce, would have been favorable to the party asserting laches, for otherwise, the delay could not be to his injury. The record of this case as has been pointed out in our previous Brief, makes no such showing.

It will also be observed from the Oregon cases and from the authority here cited, that where laches are charged against an officer seeking to enforce rights of others the doctrine will be applied with less strictness than in other causes (30 C.J.S. Section 120, p. 543), and that likewise *in cases of fraud, constructive knowledge will not apply.* (Wills v. Nehalem Coal Co. and American Surety Co. v. Multnomah County, ante).

Thus, we return to what was said on behalf of Appellant in the argument: Where a trustee in bankruptcy is charged with laches in a case where fraud is asserted, there should be no severe strictness in measuring the alleged delinquencies of the trustee as against the fraudulent activities of the defendant. Certainly, deliberate and secretive fraud is more vicious than mere asserted carelessness or negligence. Certainly too, consideration should be given to the fact that a trustee represents creditors and that these creditors are to gain by his successful activities and to lose by his failure, whatever the cause of such failure may be. Yet such creditors have no control over the trustee as such and are not to be charged as principals of the trustee in the normal legal sense. We therefore again assert, that there should be no nice balancing of the scales in order to invoke the

doctrine of limitations or of laches in the favor of a defrauding party as against innocent creditors who have been injured by the fraud.

Respectfully submitted,

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